Supreme Court, U.S.
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No. 02-1521

IN THE

Supreme Court of the United States

AT&T CORP.,
Petitioners,

v.

DARCY TING, An Individual
And On Behalf of All Others Similarly Situated, And
CONSUMER ACTION, A Non-Profit Membership Organization,
Both as Private Attorneys General,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF THE QUESTION PRESENTED

Does the Federal Communications Act preempt the application of generally applicable state contract and consumer protection laws to the terms of a de-tariffed long distance carrier's proposed contracts with consumers, even when it is proven that those contract terms would deprive consumers of any effective remedy in the civil justice system for many illegal, unfair or deceptive acts the carrier might commit?

INTRODUCTION AND SUMMARY OF ARGUMENT

This lawsuit seeks to prevent AT&T from unilaterally imposing on its long distance customers unconscionable contract terms designed to eliminate their rights. Prior to August 1, 2001, long distance carriers were not required to form contracts with their customers, because the terms of long distance service were governed by tariffs filed with the Federal Communications Commission ("FCC"). When long distance service was deregulated, however, the FCC ordered long distance carriers to enter into contracts with their customers effective August 1, 2001. Accordingly, AT&T drafted the Consumer Services Agreement (the "Original CSA"), and sent it to AT&T customers in May and June of 2001. The evidence at trial proved – and AT&T does not appeal this finding in its Petition – that the company purposefully tailored the language of both the cover letter and the CSA so that customers would not read them.

The supposed goal of the Original CSA was to require AT&T's customers to submit all claims too large for small claims court to binding arbitration. Instead of creating a contract that would have legally achieved that goal under California laws applicable to all contracts, however, AT&T drafted the Dispute Resolution Provisions of the Original CSA to (a) sharply limit the remedies available to consumers even in

cases of intentional wrongdoing by, among other things, banning punitive damages and remedies provided by state consumer protection statutes; (b) force its customers to obey draconian secrecy provisions; (c) impose prohibitive costs upon many consumers pursuing arbitration; and (d) prohibit its customers from participating in class actions against it.

Plaintiffs maintained throughout this case that these provisions were procedurally and substantively unconscionable, and that they violated several state consumer protection statutes. Following a full trial, the district court agreed and enjoined their enforcement. Based upon an extensive evidentiary record, the district court issued detailed findings and concluded that the Original CSA would have denied AT&T's customers any meaningful means of redress for many valid claims that they might have under the state's consumer protection laws. On appeal, the Ninth Circuit affirmed the declaration that these four provisions were unconscionable, although that Court reversed the trial court with respect to one of the two statutory claims, finding that California's Consumer Legal Remedies Act was preempted by the Federal Arbitration Act ("FAA").[1]

A few weeks after the issuance of the comprehensive trial court decision below, AT&T significantly re-wrote the CSA ("the Revised CSA"). Under the Revised CSA,

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[1] Although it had waived this argument in the trial court, AT&T argued to the Ninth Circuit that California's contract law of unconscionability was also preempted by the FAA. The Ninth Circuit disagreed, and AT&T has not appealed the decision on this issue in its Petition to this Court. AT&T also argued unsuccessfully below that the Original CSA was not unconscionable under California law because it would not deny its customers the ability effectively to vindicate their rights. AT&T has also failed to present this issue in its petition.

consumers are able to obtain punitive damages and other statutory remedies for any intentional wrongdoing, consumers are not bound by any secrecy provisions unless they choose to be so bound after a dispute arises, and AT&T will bear nearly all the costs of arbitration for all consumer claims below $75,000. Also, within a few weeks of the trial court's decision, the American Arbitration Association significantly re-wrote its rules to shift far more of the costs of arbitration from consumers to businesses.

AT&T argued in the trial court and in the Ninth Circuit that the Federal Communications Act ("FCA") preempts all of the plaintiffs' claims in this case. Both courts rejected this argument. In its Petition, AT&T argues that this Court should grant *certiorari* because the Ninth Circuit's decision on the question of FCA preemption in this case conflicts with the decision in *Boomer v. AT&T Corp.*, 309 F.3d 404 (7th Cir. 2002). As this opposition will show, the distinctions between *Boomer* and this case do not justify a grant of *certiorari*.

First, the divergences between these cases is not sufficient to justify this Court's jurisdiction because the cases involved very different contracts. While this case involved the Original CSA, *Boomer* involved a challenge to the Revised CSA. This difference is extremely important for several reasons. While plaintiffs only raised claims under California state law, at least two provisions of the Original CSA that were significantly altered in the Revised CSA violated not only state law, but the FCA as well. Since federal and state law on these points are in accord, there can be no implied conflict between state law and federal law – and thus no implied conflict preemption of state law – on those issues. Moreover, under applicable state law, a finding that these two provisions were unconscionable would justify striking the entire Dispute

Resolution Provisions of the Original CSA. Accordingly, even if the Ninth Circuit erred in its ruling that the FCA does not preempt California state law with respect to the Original CSA's ban on class actions, that error would not change the outcome in this case.

Second, the supposed conflict between *Boomer* and this case is greatly exaggerated by AT&T because the appeals courts in these two cases shared many precepts, and only disagreed about fairly narrow aspects of how these applied in the two cases. In addition, several of the differences in the outcomes of the two cases may be traced to differences in the factual records upon which the respective courts premised their reasoning.

Third, facts that are unique to this case render it a poor vehicle upon which to make broad pronouncements of law. As noted above, the district court made findings of fact that the Original CSA would undermine and eviscerate the ability of AT&T's customers to effectively vindicate their rights under the state consumer protection statutes. This is extremely significant, because several provisions of the FCA, as amended in 1996, explicitly save and rely upon state consumer protection statutes. Accordingly, the unusual facts of this case – certain terms in the Original CSA would have undermined the ability of consumers to obtain remedies under any and all state contract and consumer protection laws – raise legal issues unlikely to surface in many other cases.

Fourth, it is premature for this Court to address any fissure that may exist between these cases. This case and *Boomer* are the only Court of Appeals opinions addressing the extent of FCA preemption of state law since the FCC deregulated long distance service. There is significant value in letting the law on this question further develop and percolate.

Boomer demonstrates that rushing to decide this issue before the underlying regulatory scheme has stabilized can lead to errors and confusion. In *Boomer*, the Seventh Circuit decided the case on an unusually expedited basis. The court failed to consider an extremely important FCC decision issued only a few weeks prior to that decision that flatly contradicts many of the premises underlying the court's opinion.

On the merits, AT&T argues that, even if its conduct and the contract provisions in the Original CSA were illegal under California law, AT&T cannot be prevented from stripping consumers of their statutory rights and remedies because California's contract formation and consumer protection laws (and all other states' similar contract and consumer protection laws) are preempted by the FCA. AT&T's argument is wrong.

AT&T ignores the historic sea-change brought about by the recognition of both Congress and the FCC that long-distance service is no longer a monopoly and that the proper response to an era of widespread competition was to eliminate the reliance upon uniform tariffs that carried the weight of law and instead rely upon market forces (which include the normal backdrop of state commercial laws that apply to all competitive markets). AT&T's interpretation requires a tortured reading of all of the decisions interpreting and applying the filed rate doctrine as if they could have been decided just as easily under other provisions of the FCA.

STATEMENT OF THE CASE

I. FACTS ABOUT THIS LAWSUIT

The district court's 74 page opinion exhaustively describes the facts of this case. Petitioner's Appendix ("App.") 44a-109a. Plaintiffs will not replicate that discussion here. Nonetheless, some of the key facts need to be highlighted.

Under California law, contract terms will be found to be unconscionable and therefore unenforceable if they are both formed in a manner that is "procedurally unconscionable" and if they contain terms sufficiently one-sided, unfair and unreasonable to be "substantively unconscionable." App. 35a-38a, 84a-86a. The district court found that the Original CSA was procedurally unconscionable because it was a contract of adhesion and it was communicated to AT&T's customers in a manner that ensured that most of them would be "surprised" to learn of its terms. App. 86a-89a. The trial included extensive testimony and documentary evidence demonstrating that AT&T intentionally informed its customers about the Original CSA in a manner that guaranteed that few of them would notice the challenged terms. "AT&T characterized the [creation of the Original CSA] as a non-event," for example, "thereby imposing on its customers the artificial notion that they would be unaffected by the changes resulting from [the Original CSA]." App. 89a. In one in-house document, an AT&T official said that the mailing containing the Original CSA should be crafted so that it was not a "call to action" for customers. App. 55a. AT&T "downplayed" the Original CSA. *Id.* AT&T designed the envelope that contained the Original CSA so that it would look like "junk mail," App. 57a, and its marketing studies showed that many class members would not even open the mailing. App. 56a. The cover letter for the

Original CSA contained a single bolded message telling consumers that they did not need to do anything, and AT&T's own studies revealed that after reading that sentence most people would stop reading the mailing and throw it out without learning of the Original CSA's terms. App. 55a.

The district court found, and the Ninth Circuit agreed, that four features of the Original CSA were substantively unconscionable.[2] First, by its terms, section 4 of the Original CSA barred consumers from receiving punitive and other statutorily-provided damages even if AT&T committed intentional wrongful acts. AT&T asserts in its Petition that it had intended that this provision"carry forward" the liability limitations of its tariff, and that these limitations applied only to negligence claims but not claims for intentional wrongdoing. Pet. at 11. As the district court below found, however, in a lengthy discussion based upon the actual language of this provision, and in a conclusion that AT&T does not appeal in its Petition, the provision in the Original CSA went far beyond the earlier tariff. Under the plain language of the provision, the liability limitations applied not merely to claims for negligence, but also to "any other claim," and applied "whether the claim is based on contract, tort, statute, fraud, misrepresentation, or any other legal or equitable theory." App. 77a-83a, 90a. The Ninth Circuit did not need to address this holding, as AT&T only appealed the district court's refusal to rewrite that section. App. 30a, n.13.

Second, the Original CSA included a sweeping confidentiality provision making secret and requiring secrecy

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[2] AT&T challenged this determination below, but did not renew that challenge in its Petition to this Court.

about all facts concerning any dispute in arbitration. App. 92a. The district court concluded that this provision was "one-sided, oppressive, and devoid of justification ...." App. 94a. The court noted (and AT&T does not appeal this finding) that the secrecy provision would put AT&T "in a vastly superior legal posture" in litigation with its customers "since as a party to every arbitration it will know every result and be able to guide itself accordingly, while each class member will have to operate in isolation and largely in the dark." App. 93a. The Ninth Circuit affirmed the holding that this provision was unconscionable. App. 42a.

Third, after reviewing extensive evidence about the magnitude of the costs that consumers would bear under the Original CSA, App. 62a-66a, 95a-99a, the district court concluded that "in a number of situations, large arbitration costs will preclude class members from effectively vindicating their legal rights." App. 96a-97a. Again, the Court of Appeals affirmed the holding that the provisions of the Original CSA imposing prohibitive costs upon AT&T's customers were unconscionable. App. 40a-41a.

Fourth, the Original CSA prohibited AT&T's customers from bringing or taking part in class actions against the company. Prior to the Original CSA taking effect, consumers had successfully prosecuted a number of class actions against long distance phone carriers. App. 66a-67a. In one case, AT&T paid 100% of the class members' damages, App. 67a, and in another case a class recovered $88 million from another long distance carrier. App. 67a. The parties here stipulated in the district court that none of the lawyers in these earlier cases could have brought those cases on an individual basis, whether in court or arbitration. App. 67a-68a. Based on this and other substantial evidence in the record, the district court found that

"the prohibition on class action litigation [in the CSA] functions as an effective deterrent to litigating many types of claims involving rates, services or billing practices and, ultimately, would serve to shield AT&T from liability even in cases where it has violated the law." App. 68a. The Ninth Circuit affirmed this finding as well. App. 39a.

Based on the foregoing, the district court concluded that "AT&T sought to shield itself from liability .... AT&T wants to make it very difficult for anyone to effectively vindicate her rights, even in [the arbitral] forum." App. 105a-106a. Accordingly, the district court found the challenged provisions of the Original CSA to be unconscionable and illegal, and enjoined them. Following California's normal rules for contract provisions containing "multiple defects," the district court struck all of the Original CSA's "Legal Remedies Provisions." App. 100a. The Ninth Circuit also affirmed on this point. App. 38a, n.13.

II. THE COMMUNICATIONS ACT AND THE DETARIFFING EFFORT UNDERLYING AT&T'S AUGUST 2001 EFFORT TO IMPOSE THE CSA.

Understanding the preemption issues posed by AT&T requires discussion of the principal terms of the FCA bearing upon preemption, and an awareness of how the law of FCA preemption has radically changed as a consequence of the growth of competition and deregulation.

When long distance telephone service first became widespread in this nation, it was a natural monopoly. Congress recognized that if this monopoly was not regulated, the long distance company would have enormous power that could be used to give some parties or geographical areas a great

advantage over others. A central feature of the Interstate Commerce Act, which was the forerunner to the FCA, was to protect the nation from possible abuses of this monopoly power by ensuring that all phone service was provided to all people on the same terms. Accordingly, from the early 1900s on, the terms of phone service were not governed by contract principles as an agreement between two parties, but by the principle that the terms themselves became a species of law. *See Western Union Telegraph Co. v. Esteve Brothers*, 256 U.S. 566, 571 (1921) ("The Act of 1920 introduced a new principle into the legal relations of the telegraph companies with their patrons.... The rate became, not as before a matter of contract by which a legal liability could be modified, but a matter of law by which a uniform liability was imposed.").

While no language in the Interstate Commerce Act itself gave rise to a hard rule of uniformity, that gap was soon filled. When the FCA was first enacted, the legal mechanism that was developed to ensure uniformity was incorporated into § 203. This section provides that common carriers shall file schedules with the FCC setting out their rates, as well as "classifications, practices, and regulations affecting such charges." 47 U.S.C. § 203. These schedules became known as tariffs. For many decades, long distance telephone service was governed by these tariffs, which were filed with and approved by the FCC. The preemptive force of § 203 was absolute in its scope. "If approved, the tariff exclusively controlled the rights and liabilities of the parties as a matter of law." App. 46a. The reason for the absolute preemptive force of these tariffs was simple: "A tariff filed with a federal agency is the equivalent of a federal regulation." *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488 (7th Cir. 1998).

The absolute preemptive scope of § 203 was embodied in "the filed rate doctrine," which was the "central principle of the regulatory scheme for interstate telecommunications carriers." *Lipton v. MCI Worldcom, Inc.*, 135 F. Supp. 2d 182, 187 (D.D.C. 2001) (citation omitted). The entire focus of this Court's most recent decision dealing with FCA preemption revolves around § 203 and the filed rate doctrine. *See AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998).

In 1996, Congress deregulated long distance service. It did this by amending the FCA to permit the FCC to forbear from enforcing § 203, and thus to eliminate the filed rate doctrine. As the Court of Appeals below noted, Congress envisioned the 1996 Amendments as "a dramatic break with the past that would revolutionize long-distance service by greatly decreasing the scope of the FCC's role." App. at 26a. Accordingly, acting pursuant to the 1996 Amendments, 47 U.S.C. § 160(a), the FCC ended the system of tariffs. 11 F.C.C. Rcd. 20,730 (1996). In the place of tariffs, the FCC required that the same backdrop of laws, "incentives and rewards" that govern companies in other fields would apply to carriers. 11 FCC Rcd. 20,730 at ¶ 4.

AT&T fiercely fought the detariffing movement that ended that doctrine.[3] In this case, however, AT&T argues that § 203 and the filed rate doctrine were always mere procedural devices, and that they were superfluous to the Act's actual preemptive force. AT&T now asserts that an absolute requirement of uniformity, and a sweeping preemptive force,

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[3] AT&T had unsuccessfully opposed complete detarriffing, hoping it could continue to "limit [its] liability through tariff provisions." *Interstate Interexchange Marketplace*, 12 FCC Rcd. 15,014 at ¶ 8 (1997).

arises from two different provisions of the FCA – 47 U.S.C. § 201 and § 202.

FCA § 201 provides that the terms of long-distance service must be "just and reasonable." 47 U.S.C. § 201. AT&T argues that this section means that state laws of contract formation and breach, and consumer protection laws generally, may never render any term of a long distance carrier's contract unconscionable.

Section 202 of the FCA provides that long-distance carriers may not "give any undue or unreasonable preference" to any particular set of customers. 47 U.S.C. § 202. AT&T contends that plaintiffs' claims are preempted by § 202 because application of California law to AT&T's conduct in California constitutes "unjust or unreasonable discrimination" that gives California customers an "undue or unreasonable preference or advantage."

Unlike the absolute language of § 203, §§ 201 and 202 use heavily qualified language. The terms of these provisions do not speak of complete uniformity, but only bar "unreasonable" preferences and "unreasonable" terms. In the wake of deregulation, these terms cannot be read in the absolute manner in which § 203 was consistently interpreted for decades.

The withdrawal of FCC regulation was not meant to herald an era of lawlessness in the telecommunications industry. Instead, the framers of the 1996 Amendments intended that state law would play an important role in preserving consumer protections. *See* App. 48a (citing comments in legislative history about the crucial role of state consumer protection laws). The FCC concurred. In its statements relating to detariffing, the FCC said that it would henceforth rely upon the

marketplace to ensure that §§ 201 and 202 were enforced. *E.g., Second Report and Order*, 11 F.C.C.R. 20,730, ¶ 4. When the FCC has used the term "marketplace" in similar contexts, it has always contemplated that term as including state contract and consumer protection laws. In *In the Matter of Southwestern Bell Mobile Systems, Inc.*, 14 F.C.C.R. 19,898 (1999), for example, the FCC agreed with several carriers that the 1996 Act established a preference for "the competitive forces of the marketplace, rather than governmental regulation," but cautioned that it did not agree with the Petitioner's arguments "to the extent that they imply such preference for competition over regulation results in a general exemption for the [mobile phone] industry from the neutral application of state contractual or consumer fraud laws." 14 F.C.C.R. at 19,903. Accordingly, the FCC's statements on detariffing spoke of the centrality of state consumer protection and contract laws. *See, e.g., Second Report and Order*, 11 FCC Rcd 20,730 at 20,753 (1996).

AT&T reacted with alarm to the FCC's position that, in the detariffed environment, long distance carriers would be subject to state consumer protection laws. It filed a petition requesting that the FCC announce that it was going to continue to enforce § 201 and § 202 as they related to the terms of long distance service. AT&T also requested that the FCC make an express statement that this continued enforcement would "exclusively" govern the terms of service. AT&T did not get what it wanted. In its substance, as the district court found, the FCC "granted in part and denied in part AT&T's petition. . . ." App. 50a. The FCC's Order on Reconsideration provided in relevant part:

> [T]he [FCA] continues to govern determinations as to whether rates, terms, and conditions for interstate, domestic, interexchange services are

> just and reasonable, and are not unjustly or unreasonably discriminatory. [However,] *we note that the Communications Act does not govern other issues, such as contract formation and breach of contract, that arise in a detariffed environment. As stated in the Second Report and Order, consumers may have remedies under state consumer protection and contract laws as to issues regarding the legal relationship between the carrier and customer in a detariffed regime.*

12 FCC Rcd 15,014 at ¶ 77 (emphasis added).

Thus, while the FCC clarified that it would continue to regulate the "rates, terms and conditions" of service, it made equally clear that issues of *contract formation and breach* would now be governed by state law and that consumers would now have remedies under state consumer protection and contract laws as to issues regarding the legal relations between the carrier and customer. The order did not state that any body of state law was preempted. The FCC subsequently stated unequivocally that consumers "are protected by the full range of state laws, including those governing . . . consumer protection, and deceptive practices." App. 51a.

In the detariffed environment, the FCC has made clear that carriers no longer must offer uniform contract terms to all consumers. Indeed, the FCC has made clear that carriers are now free under §§ 201 and 202 to offer different terms to different consumers, and the agency relies upon the marketplace to ensure that these distinctions are not unreasonable or unjust. In *Orloff v. Vodafone Airtouch Licenses*, 17 F.C.C.R. 8987 (2002), for example, the FCC permitted a carrier to negotiate

separate and different agreements with each of its consumers. The FCC held that these contract variations did not violate section 202(a) of the FCA because market forces would not permit unreasonable discrimination. 17 F.C.C.R. at 8996-97. The agency also treated §§ 201 and 202 in the same manner. *See Orloff*, 17 F.C.C.R. at 8999 (rejecting Orloff's § 201(b) claim simply for "the reasons discussed above [in the dismissal of his § 202(a) and (b) claims]").[4]

Through this Petition, AT&T asks this Court to adopt positions that it was unable to convince the FCC to adopt.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT WARRANTING REVIEW BY THIS COURT.

A. The Significant Factual Differences Between this Case and *Boomer* Weigh Heavily Against Review.

AT&T's principal argument that this Court should grant *certiorari* relies upon the differing perspectives of the Ninth

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[4] The *Orloff* case arose in the cellular phone context. While it is true that the cellular phone companies were never subject to any tariff, the FCC's statements relating to §§ 201 and 202 in that context apply with equal force in the long-distance context. In its decisions to detariff long-distance service, the FCC made clear that its goal was to create a system that would rely upon the same market policing forces for long-distance service as governed cellular phones. *See In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 11 F.C.C.R. 7141, 7158 (1996). In other words, the cellular phone context is the model for the world of detariffed long distance service, and the FCC's interpretations of §§ 201 and 202 in cases involving cellular companies are completely applicable here.

Circuit in this case and the Seventh Circuit in the *Boomer* case. In fact, much of the difference between these decisions may reflect the great differences in the contracts that the two courts considered.

As set forth above, the Ninth Circuit affirmed the order enjoining the Dispute Resolution Provisions of the Original CSA based upon the unconscionability of four provisions of the Original CSA: (1) the limitation on liability even for intentional wrongdoing; (2) the broad secrecy provision; (3) the prohibitive costs of arbitration; and (4) the prohibition on class actions. As set forth on the Statement of the Case, however, AT&T re-wrote the first three of these provisions immediately after the trial in this case. The Seventh Circuit noted that it was addressing only the Revised CSA. *See Boomer*, 309 F.3d at 410 ("AT&T later amended the CSA to further reduce the potential arbitration expense. . . .")[5] Accordingly, the version of the CSA that was before the Seventh Circuit in *Boomer* was very different from the version at issue here.

The differences between the contracts at issue in this case and *Boomer* are particularly significant for two reasons. First, two of the contract provisions at issue in this case were illegal under the FCA. As noted above, the courts below found (and AT&T does not challenge this determination in its Petition) that the Original CSA would bar consumers from receiving any consequential or punitive damages, even in the case of intentional wrongdoing. Under authorities acknowledged by AT&T, however, any provision that would

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[5] The Seventh Circuit did not address the limitations on liability in cases of intentional wrongdoing that had been contained in § 4 of the Original CSA, or the secrecy provision of the Original CSA, further demonstrating that *Boomer* involved a different set of issues.

immunize AT&T from intentional wrongdoing has been conclusively determined to violate the FCA. *See, e.g., In the Matter of AT&T*, 76 F.C.C.2d 195, 197 n. 5 (1980) ("liability for willful misconduct is borne by the shareholder [of AT&T]"). In addition, the CSA contained a sweeping secrecy provision. That provision greatly exceeded the limited and discrete confidentiality provision of the FCA, which provides limited confidentiality only with the consent of the consumer, 5 U.S.C. § 574(b), and AT&T effectively recognized this fact when it re-wrote the provision in the Revised CSA to track that statutory language.

The point here is not that plaintiffs are advancing or have previously advanced in this case any cause of action under the FCA – they consistently disclaimed such an intention, and this case was brought solely on state law grounds.[6] Instead, the point is that AT&T cannot claim that state laws applied to these provisions of the Original CSA are preempted by the FCA, when those same provisions that were held to violate state law also violate the FCA. Where both bodies of law would reach the same result (invalidating the provision), there is no conflict between them.

The differences between the contracts are also particularly significant for a second reason. Under California's

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[6] AT&T states in its Petition that it is "undisputed" that the Original CSA complies with the FCA. Pet. at 1. This is simply not true. It is true that plaintiffs did not bring their case under the FCA, but they never agreed that the Original CSA complied with the FCA. Indeed, plaintiffs pointed to the plain language of AT&T's provision to disprove AT&T's claims that the limitation on liability provision was not "intended" to restrict damages for wrongful misconduct (and therefore supposedly complied with the FCA), and the courts below agreed with plaintiffs on this point.

law of unconscionability, where an arbitration clause contains multiple illegal provisions, that is grounds for a court to strike the entire arbitration clause. *Armendariz v. Foundation Health Psychare Services*, 6 P.3d 669, 775 (Cal. 2000) (presence of "multiple defects" is grounds for refusing to sever individual unconscionable provisions, but instead strike the entire arbitration provision). In this case, AT&T argued below that under California law, the court should merely strike any unconscionable terms but leave the remainder of the Original CSA's Legal Remedies Provisions in place. The district court below rejected AT&T's argument, however, and held that the permeation of multiple unconscionable provisions required excising all of the Original CSA's Legal Remedies Provisions. App. 99a-100a. The Court of Appeals affirmed. App. 43a. Accordingly, the presence of the two unconscionable provisions that also violate the FCA would be sufficient to justify the entire decision below, even with respect to the other contract terms which AT&T claims are permitted under the FCA. When an alternate, exclusively state-law ground exists for affirming the court of appeals, this Court should deny certiorari. *E.g.*, *South Dakota v. Kansas City S. Indus., Inc.*, 880 F.2d 40 (9th Cir. 1988), *cert. denied*, 493 U.S. 1023 (1990).

The significance of any legal split between the decision below and *Boomer* is also muted in light of the vastly different factual records before the courts. One of the central holdings of *Boomer* was that the FCA preempted any state law that might apply to the Revised CSA because the application of state law would increase AT&T's costs. *Boomer*, 309 F.3d at 419 This is, self-evidently, an empirical question of fact, not a legal issue. The *Boomer* court does not indicate what *admissible evidence*, if any, existed in the record to support its conclusion on the point. *Id.* Instead, the *Boomer* court appears to imagine that this factual question is one upon which a court might

speculate as to the answer. In this case, by contrast, after the same issue was raised by AT&T, and after evidence was introduced by each side and the witnesses were cross-examined, the district court specifically found that AT&T had *not* demonstrated that the Original CSA would reduce its costs. App. 91a. The district court's factual finding was not surprising, in light of the extensive evidence of the substantial transaction costs that would be created by the mechanisms employed in the Original CSA. *E.g.*, App. 65a (the average arbitrator in Northern California charges $1,899 for a day of hearings). As the district court below noted, App. 91a, the FCC also has explicitly announced a finding of fact that requiring compliance with state contract and consumer protection laws will not increase the costs of long distance carriers. "[R]equiring nondominant interexchange carriers to conduct their businesses as do other businesses in unregulated markets will not substantially increase their costs." 12 FCC Rcd. 15,014 at ¶ 15.[7] The expert agency's determination on this point deserves substantial deference. A divergence among the Courts of Appeals that is rooted in differing factual conclusions drawn from different factual records does not justify the exercise of this Court's jurisdiction.

AT&T also exaggerates the alleged conflict between the opinion below and *Boomer*. In fact, the appeals courts in both

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[7] As set forth in the Statement of the Case, the trial court below also found that the unconscionable terms of Original CSA (such as the provision stripping remedies even for intentional wrongdoing) would prevent many consumers with valid claims under the state's consumer protection statutes from vindicating their rights. The Seventh Circuit, by contrast, did not consider this factual issue with respect to the Revised CSA. This factual difference is significant with respect to both FCA preemption and the supposed split between this case and *Boomer*, as this Opposition will establish below in the discussion of the prematurity issue.

cases share many core precepts. Like the Ninth Circuit, the *Boomer* court found no express or field preemption. *Boomer*, 309 F.3d at 417, 424. Like the Ninth Circuit, the *Boomer* court agreed that "state law may determine whether a contract has been formed," *id.* at 423, although it disagreed with the Ninth Circuit's view that this rule extends to the contract law doctrine of unconscionability. Like the Ninth Circuit, the *Boomer* court also agreed that "following detariffing, there appears to be some role for state law." *Id.* at 424. While the courts disagreed upon the precise contours of the role for state law, and some of the implications to be drawn from these principles, there is also much in common in their approaches. In this blurred setting, a grant of *certiorari* is not appropriate. *See Miroyan v. U.S.*, 439 U.S. 1338, 1339 (1978) ("[w]hile there is undoubtedly a difference of approach between the Circuits on [the application of the Fourth Amendment to tracking beepers], I am not sure that there is a square conflict . . . ."); Michael S. Schenberg, *Identification, Tolerability, and Resolution of Intercircuit Conflicts*, 59 N.Y.U.L. Rev. 1007, 1013-14 ("when two courts apply the same legal rule to similar facts and reach different conclusions, the presumption is that there is no conflict.").

B. This Case Is A Poor Vehicle to Address the Relationship Between Federal and State Law in this Area Because of the Unique Facts of this Case.

Another factor that argues for allowing this issue to percolate further in the lower courts is that this case is a very poor vehicle to address the broad question that AT&T wishes this Court to answer. AT&T asks this Court to determine if any state laws may ever be applied to any term in a long-distance contract, but in fact the state laws at issue here fall within a narrow and unusual category – laws that are necessary to ensure

that consumers are not stripped of their ability to effectively vindicate their rights under any and all state consumer protection laws. Even AT&T has not claimed that it is exempt from all state consumer protection laws; it has only claimed that those laws may not be applied to the terms of their contracts. With respect to other behavior, however, throughout this litigation AT&T has acknowledged, as it must, that state consumer protection laws are not preempted as they apply to deceptive or false statements about the terms of a contract. In this case, however, applying state consumer protection and contract laws to the terms of the Original was necessary to ensure that those laws are not vitiated with respect to all issues.

As set forth above, after a full trial on the matter, the trial court below made a finding of fact that the Original CSA would bar many of AT&T's customers from effectively vindicating even valid claims under state consumer protection acts. This finding, which is entitled to great deference, is not challenged in AT&T's Petition. This finding makes the state laws at issue in this case uniquely consistent with the FCA, because several provisions of the Act explicitly rely upon state consumer protection acts to achieve its purposes. *See* 47 U.S.C. § 253 (preserving "consumer protection" laws relating to new carriers entering the long distance field); 47 U.S.C. § 254 (preserving a role for states in ensuring that universal service is available at rates that are just, reasonable and affordable); 47 U.S.C. § 261(c) (preserving state laws that further competition in the provision of phone exchange services). Thus, the state laws at issue in this case are uniquely essential to the effective operation in any case of any state laws. Unlike most settings where the relationship of federal and state law might be explored, AT&T's Petition raises the unusual spectre that its interpretation of §§ 201 and 202 would enable the company to

to promulgate contract terms that would vitiate §§ 253, 254 and 261.

This case is also a poor vehicle in light of the fact that AT&T has re-written three of the contract provisions at issue. While AT&T surely has a technical right to appeal a judgment declaring these provisions illegal, in case it might some day wish to resurrect them, it is a poor use of this Court's resources to adjudicate the legality of contract terms that have been abandoned for more than a year.

C. Any Split That May Exist Between This Case and *Boomer* is Immature.

It would also be premature for this Court to review the alleged conflict at issue here. The FCC only de-tariffed long distance service on August 1, 2001, and only two courts have considered this issue since that date. The novelty of this issue increases the value of allowing the law to develop further in the lower courts. The *Boomer* decision was issued only a few weeks after the FCC handed down its decision in *Orloff*, for example, and the *Boomer* court did not cite to or mention *Orloff*. In *Boomer*, the Seventh Circuit declared that §§ 201 and 202 require service to be uniform to all customers. In *Orloff*, however, the FCC made clear that carriers are free to charge different rates to different customers based on individual negotiations. This demonstrates the value in allowing the law to develop here. In its great haste (the Seventh Circuit issued its decision only about ten weeks after the appeal was filed), the Seventh Circuit missed the FCC's clear statement that it would rely upon competition to enforce §§ 201 and 202, and that uniformity was no longer required in the detariffed regulatory scheme. This Court should not repeat the mistake of rushing to

resolve the issue even as the FCC's brand new regulatory scheme settles in.

II. THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

A. There Is No Express or Field Preemption Here.

This Court has recognized three situations where federal law preempts state law: where a Congressional Act has "an express provision for preemption;" where Congress intends federal law to "occupy the field," and "to the extent of any conflict with a federal statute." *Crosby v. National Foreign Trade Council*, 530 U.S. 353, 372 (2000). None of these situations applies here.

The FCA does not expressly preempt the plaintiffs' claims. AT&T relies upon § 201 of the Act, which requires that the terms of service be just and reasonable, and § 202, which forbids unjust or unreasonable preferences in long distance service. Neither of these provisions purports to preempt any state laws. Neither provision uses the term preemption, or speaks of foreclosing state laws of contract formation or consumer protection statutes.

In addition, the FCA contains a general Saving Clause (as well as other provisions saving state consumer protection laws, as noted above). The FCA states that "nothing in this Act . . . shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act . . .

are in addition to such remedies." 47 U.S.C. § 414.[8] This Court has interpreted express preemption provisions narrowly in statutes where there are Savings Clauses. *See Sprietsma v. Mercury Marine*, 123 S. Ct. 518, 526 (2002) (reading express preemption provision of Federal Boat Safety Act of 1971, 46 U.S.C. 4301 narrowly not to reach common law claims in light of Act's savings clause). Accordingly, it is clear that the FCA does not expressly preempt plaintiffs' claims.

Nor can it be said that the FCA preempts the entire field of long distance telephone service. As noted above, the FCA's savings clauses carve out important roles for state law. Where a statute expressly preserves an extensive role for states, any claim of field preemption is foreclosed.

B. There Is No Implied Conflict Preemption Here.

Implied preemption arises only when there is an "actual conflict" between federal and state law, either because it would be "impossible for a private party to comply" with both or because the state law "stands as an obstacle to the accomplishment and execution of the full purposes of Congress." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995). There is no such conflict here.

First, the Ninth Circuit's decision is entirely consistent with the FCC's repeated public statements about the effect of

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[8] In *Central Office*, this Court held that § 414 could not be used to put the FCA at odds with itself by undermining the uniformity necessarily required by § 203. In the wake of detariffing, however, and the FCA's explicit reliance upon state consumer protection acts in several different provisions, nothing in §§ 201 or 202 overrides § 414.

detariffing and the relationship of state and federal law. As noted in the Statement of the Case, when the FCC announced its decision to detariff, it declared that consumers would not only have remedies under the FCA, but would "also be able to pursue remedies under state consumer protection and contract laws." *Second Report and Order*, 11 FCC Rcd 20730, 20753 (1996). As set forth in some detail above, when AT&T complained and asked the FCC to reconsider, the FCC's response was to agree that it would continue to enforce the FCA. It did not state that any state laws were preempted or excluded by the FCA, however, and it did not retract the statement that consumers would continue to have remedies under state contract laws.

AT&T's argument that state laws of contract formation and consumer protection are preempted if they would limit the terms of long distance service contracts is flatly contrary to the FCC's statements on this issue. In its Order on Reconsideration, the FCC stated explicitly that state laws of contract formation apply to long distance contracts, and that consumers would have remedies under state laws of contract and consumer protection regarding the "legal relationship" between the carrier and consumers. 12 FCC Rcd 15,014 at § 77. Plaintiffs' claims here are based on precisely these state laws.

In short, AT&T's repeated reliance upon the word "agreed" in the Order on Reconsideration overstates the import of the ruling. In substance, the FCC agreed with AT&T's petition only in part. The FCC agreed with AT&T only to the extent that it acknowledged that it was not wholly abandoning its authority under § 201and § 202. But the FCC declined to take the second and more important step requested by AT&T, and never claimed to exert *exclusive* federal authority over long

distance contracts. To the contrary, it firmly reasserted the important role to be played by state law effective August 1, 2001.

The FCC's detariffing orders also state that carriers are to be treated like all other businesses in unregulated markets, 11 FCC Rcd. 20,730 at ¶ 4, further disproving AT&T's position. All other unregulated businesses in the U.S. are subject to state contract law and state consumer protection laws. The FCC states that AT&T is also subject to these laws.[9] As established in the Statement of the Case, when the FCC states that it is counting upon "market forces" to ensure that § 201and § 202 are enforced, it has repeatedly stated that those forces include state contract and consumer protection laws. Indeed, when a carrier suggested that the FCC's reliance upon market forces implied an exemption from "the neutral application of state contractual or consumer fraud laws," the FCC flatly and explicitly rejected that claim. *Matter of Southwestern Bell*, 14 F.C.C.R. at 19,903.

As set forth above, in the *Orloff* case the FCC completely rejected AT&T's notion that absolute federally-imposed uniformity is the rule in the detariffed world. Far from requiring uniformity, the FCC has permitted a carrier operating in a deregulated environment to negotiate separate contracts with each customer.

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[9] After the Order on Reconsideration, the FCC continued officially to inform consumers that they are protected by the "full range" of state laws relating to contracts and consumer protection. App. 51a, 105a. The FCC also tells consumers that it is *not* their exclusive remedy: "If you are not satisfied with the carrier's response to your complaint, the Commission's rules allow you the opportunity to either file a formal complaint or seek relief through civil court." App. 27a.

The Ninth Circuit's decision is also consistent with the text, structure and purpose of the FCA. When Congress chose to allow the FCC to detariff long-distance service, and to require the carriers to form contracts with their customers, it necessarily chose to permit state contract law to play a significant role. The filed rate doctrine arises from federal law, but a contract "is not the filed rate and therefore is not a simple creature of federal law." *Fax Telecommunicaciones, Inc. v. AT&T*, 138 F.3d 479, 487 (2d Cir. 1998). Given that contracts – unlike tariffs – are not a species of federal law, it follows that state law must govern them.

In addition, as set forth by extensive citations in both opinions below, AT&T's argument is belied by the legislative intent underlying the Act. When Congress deregulated the long-distance market, it drastically de-emphasized the role and power of the FCC, and frequently expressed concerns for federalism. App. 5a, 26a-27a, 48a-49a. To treat the 1996 Amendments as having left the FCC's exclusive authority entirely intact is to re-write this history.

Further, AT&T's interpretation of § 201and § 202 places those provisions at odds with numerous other provisions of the FCA. As set forth in the Statement of the Case, after reviewing extensive evidence, the district court made a factual finding (that AT&T challenged in the Ninth Circuit, but has not challenged in its Petition) that the Original CSA would prevent consumers from effectively vindicating their legal rights under state consumer protection statutes. As also set forth above, however, the 1996 Amendments added a number of other savings clauses to the Act, evidencing a Congressional desire to preserve a meaningful role for the states in this area. *E.g.* 47 U.S.C. §§ 253(b), 254(I), and 261(c). A decision adopting AT&T's argument that § 201 and § 202 implicitly permit it to

adopt contract terms that will effectively vitiate those laws would undermine the overall purposes of the FCA.[10]

None of the authority cited by AT&T to support its FCA preemption argument withstands scrutiny. AT&T relies extensively upon the *Esteve* case from 1922, for example. See Petition at 2, 4, 20-21. *Esteve*, however, arose in the entirely different context where long-distance service was a natural monopoly and where the federal government could not rely upon "market forces" (as those have been defined by the FCC). These very different assumptions are made clear in the opinion -- the fundamental precept of *Esteve* was that the terms of long distance service were *not* based upon contract principles, but were instead a matter of *law*. 25 U.S. at 271. The entire point of the 1996 Amendments and the FCC's decision to detariff, by contrast, is to make clear that now – unlike 1922 – long distance service is to be governed by *contract* principles.

AT&T also repeatedly cites *Central Office*, 524 U.S. 214, Petition at 2, 20, 22, but the holding in *Central Office* is driven and bounded by the principles and rationale of the filed rate doctrine, and does not apply in the detariffed environment. For example, the *Central Office* Court concluded that the plaintiffs' claims there were barred because they related to "privileges not included in the tariff," 524 U.S. at 226, and repeatedly posed as the determinative issue whether the filed

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[10] AT&T's position that § 202 requires that it be allowed to gut state consumer protection acts is inherently at odds with the language of the statute. The language of § 202 permits "just" and "reasonable" variations in service, and does not require absolute uniformity. There is nothing "unjust or unreasonable" about precluding long distance carriers from stripping consumers of their rights under state consumer protection laws, and their ability to effectively vindicate such rights.

rate doctrine applied to the claims at issue. 524 U.S. at 216, 221-26. AT&T argues that *Central Office* could just have well been decided on the grounds of § 201 and § 202, but as the Ninth Circuit correctly pointed out, this interpretation of § 201 and § 202 would render § 203 superfluous. App. 18a. AT&T's claim that the decision below conflicts with this Court's decision in *Central Office* is based upon the faulty presumption that this Court's decision on one theory might instead have been rendered upon a completely different theory not actually embraced by the Court.

C. The Decision Below Will Not Harm the Long-Distance Industry.

AT&T asserts in its Petition that the decision below will adversely affect the entire long distance industry and subvert the FCC's regulation of it. Nothing could be further from the truth. The Ninth Circuit's decision simply prevents AT&T from eliminating its customers' rights under state law – rights that the FCC has said those customers may enforce to protect itself. The FCC has also stated that requiring long distance carriers to comply with the same laws that govern other competitive industries will not increase the costs of those carriers or otherwise harm them. 12 FCC Rcd. 15,014 at ¶15. In addition, it is hard to accept AT&T's statement that the ruling below was devastating to its ability to operate its business when AT&T itself re-wrote three of the four provisions of the Original CSA that were struck down more than a year ago, with no apparent harm to its business.

CONCLUSION

For the foregoing reasons, the Petition for *Certiorari* should be denied.

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